(1)

Supreme Court, U.S.
FILED

94 284 AUG - 3 1994

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

---

SUSAN D. BIERI and LEONARD BIERI, III,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

---

**Petition for Writ of Certiorari
To The United States Court of Appeals,
For the Eighth Circuit**

---

# PETITION FOR WRIT OF CERTIORARI

---

James R. Wyrsch
(Counsel of Record)
Jacqueline A. Cook
Wyrsch Atwell Mirakian
Lee & Hobbs, P.C.
1101 Walnut Street, 13th Fl.
Kansas City, MO 64106-2122
Tel: (816) 221-0080
Fax: (816) 221-3280

*ATTORNEYS FOR PETITIONERS*

73 pp

## QUESTIONS PRESENTED

I. WHETHER THE CORRECT STANDARD OF PROOF IN A CRIMINAL FORFEITURE ALLEGATION, CHARGED UNDER 21 U.S.C. § 853, IS BEYOND A REASONABLE DOUBT OR PREPONDERANCE OF THE EVIDENCE.

II. WHETHER A SEARCH WARRANT ISSUED BY A JUDGE BASED ON HIS "INTUITION AND EXPERIENCE" MEETS FOURTH AMENDMENT REQUIREMENTS OF PROBABLE CAUSE AND PARTICULARITY.

## LIST OF PARTIES

The Petitioners are Susan D. Bieri and Leonard Bieri, III.

The Respondent is the United States of America.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

CONSTITUTIONAL, STATUTORY AND REGULATORY AUTHORITIES ..... 1

PRIOR OPINIONS IN THIS CASE ..... 2

JURISDICTIONAL STATEMENT ..... 2

STATEMENT OF THE CASE ..... 3

Procedural Background ..... 3

Factual Background ..... 5

ARGUMENT ..... 9

CONCLUSION ..... 28

INDEX TO APPENDIX ..... App. i

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Alexander v. United States*,
_____ U.S. _____, 113 S. Ct. 2766 (1993) ..... 9

*Andresen v. Maryland*,
427 U.S. 463 (1976) ..... 20, 23

*Austin v. United States*, _____ U.S. _____,
113 S. Ct. 2801 (1993) ..... 9

*Blocke v. United States*,
11 U.S. (7 Cranch), 339 (1813) ..... 19

*Calero-Toledo v. Pearson Yacht Leasing Co.*,
416 U.S. 663 (1974) ..... 10

*Coolidge v. New Hampshire*,
403 U.S. 443 (1971) ..... 20, 23

*Illinois v. Gates*,
462 U.S. 213 (1983) ..... 19, 20, 23, 25

*In re Winship*,
397 U.S. 358 (1970) ..... 12

*Maryland v. Garrison*,
480 U.S. 79 (1987) ..... 20

*Massachusetts v. Sheppard*,
468 U.S. 981 (1984) ..... 26

*One Lot Emerald Cut Stones and One Ring v. United States*,
409 U.S. 232 (1972) ..... 18

*One Plymouth Sedan v. Pennsylvania*,
380 U.S. 693 (1965) ..... 27

*Palmyra*,
25 U.S. (12 Wheat) 1 (1827) ..... 9

*Patterson v. New York*,
432 U.S. 197 (1977) ..... 12

*Republic Nat'l Bank of Miami v. United States*,
506 U.S. _____, 113 S. Ct. 554 (1992) ..... 9

*Texas v. Brown*,
460 U.S. 730 (1983) ..... 20

*Ulster County Court v. Allen*,
442 U.S. 140 (1979) ..... 14, 15

*United States ex rel. Beal v. Skaff*,
418 F.2d 430 (7th Cir. 1969) ..... 20

*United States v. Durrough*,
927 F.2d 498 (10th Cir. 1991) ..... 24

*United States v. Elgersma*,
971 F.2d at 694, (11th Cir. 1990) ..... 12, 13, 14

*United States v. Ellison*,
793 F.2d 942 (8th Cir. 1987) ..... 24

*United States v. Garcia*,
882 F.2d 699 (2d Cir. 1989) ..... 22

*United States v. Goff*,
681 F.2d 1238 (9th Cir. 1982) ..... 20

*United States v. Goodwin*,
854 F.2d 33 (4th Cir. 1988) ..... 20

*United States v. Hernandez-Escarsega*,
886 F.2d 1560 (9th Cir. 1989) ..... 10, 13, 14, 17

*United States v. Leon*,
468 U.S. 897 (1984) ..... 25, 26, 27

*United States v. Lowe*,
575 F.2d 1193 (6th Cir. 1978) ..... 20

*United States v. Nichols*,
841 F.2d 1485 (10th Cir. 1988), ..... 10

*United States v. Olano*,
_____ U.S. _____, 113 S. Ct. 1770 (1993) ..... 26, 27

*United States v. Pryba*,
674 F. Supp. 1518 (E.D. Va. 1987) ..... 15

*United States v. Ricciardelli*,
998 F.2d 8 (1st Cir. 1993) ..... 20, 22

*United States v. Sandini*,
816 F.2d 869 (3d Cir. 1987) ..... 17

*United States v. Tagbering*,
985 F.2d 946 (8th Cir. 1993) ..... 20

*United States v. Wylie*,
919 F.2d 969 (5th Cir. 1990) ..... 20

## Constitutional, Statutory, and Regulatory Authorities

18 U.S.C. § 3742 ..... 4
18 U.S.C. § 924(c) ..... 3
18 U.S.C. § 1961 ..... 11
18 U.S.C. § 1963 ..... 12
18 U.S.C. § 3231 ..... 4
19 U.S.C. § 1595(a) ..... 11
21 U.S.C. 848 ..... 11
21 U.S.C. § 853 ..... 2, 4, 10, 12, 13, 14, 15, 16, 17, 18, 19, 28, App. 2
21 U.S.C. § 841 ..... 3
21 U.S.C. § 846 ..... 3
21 U.S.C. § 881 ..... 11, 18
28 U.S.C. § 1254 ..... 3, 5
28 U.S.C. § 1291 ..... 4
Fed. R. App. P. 4(b) ..... 4
Fed. R. Crim. P. 7 ..... 15, 16, 17, App. 4
Fed. R. Crim. P. 31 ..... 12, 15, 16, 17, App. 5
Fed. R. Crim. P. 32(b)(2) ..... 12, 16
S. Ct. R. 12.2 ..... 3, 5
U.S. Const., Eighth Amendment ..... 5, App. 2
U.S. Const., Fifth Amendment ..... 28, App. 1
U.S. Const., Fourth Amendment .. 19, 20, 23, 27, App. 1
U.S. Const., Sixth Amendment ..... 28

**Miscellaneous**

*Black's Law Dictionary* 545 (5th ed. 1979) ..... 9, 10

*Brikey, Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 Va. L. Rev. 493, n. 1 (1986) ..... 9

S. Rep. No. 98-225, 98th Cong., 2d Session, reprinted in 1984 U.S.C.C.A.N. 3182 ..... 10, 11, 14, 16, 18, 19

## CONSTITUTIONAL, STATUTORY AND REGULATORY AUTHORITIES

Set forth more fully in Appendix:

The Fourth Amendment of the United States Constitution.

The Fifth Amendment of the United States Constitution.

The Sixth Amendment of the United States Constitution.

21 U.S.C. § 853, Criminal Forfeiture.

Federal Rule of Criminal Procedure 7.

Federal Rules of Criminal Procedure 31.

## PRIOR OPINIONS IN THIS CASE

The Order of Forfeiture of the United States District Court for the Western District of Missouri in this matter is unreported but appears in the Appendix at xxxiii. The Order and Judgment of the United States Court of Appeals for the Eighth Circuit as to the forfeiture matter is reported in 21 F.3d 819 (8th Cir. 1994), and appears in the Appendix at xvii. The Order and Judgment of the United States Court of Appeals for the Eighth Circuit as to the Petitioners' direct criminal appeal is reported in 21 F.3d 811 (8th Cir. 1994) and appears in the Appendix at ii. The Order in the United States Court of Appeals for the Eighth Circuit denying the Petition for Rehearing and/or Rehearing En Banc as to forfeiture is unreported, but appears in the Appendix at xxxi. The Order of the United States Court of Appeals for the Eighth Circuit denying the Petition for Rehearing and/or Rehearing En Banc as to the direct criminal appeal is unreported but appears in the Appendix at xxxii.

## JURISDICTIONAL STATEMENT

The Order and Judgment of the United States Court of Appeals for the Eighth Circuit as to forfeiture was entered on April 13, 1994, affirming the District Court's application of a preponderance of the evidence standard to determine whether the Bieri farm was forfeitable under 21 U.S.C. § 853. The Court of Appeals held that the District Court erred in ordering forfeiture of only one tract of the four tract farm without engaging in a proportionality analysis, and, therefore, reversed the Order of Forfeiture and remanded to the District Court for the entry of a judgment forfeiting the entire farm unless the District Court found on remand that the forfeiture of the entire farm amounted to a constitutionally excessive fine under the Eighth Amendment. The Court of Appeals thereafter denied Petitioners' timely filed Petition for Rehearing and/or Rehearing En Banc on May 20, 1994.

The Order and Judgment of the United States Court of Appeals for the Eighth Circuit as to Petitioners' direct criminal appeal was entered on April 13, 1994, affirming Petitioners' convictions and holding that the warrant was issued with sufficient probable cause and with sufficient particularity. The Court of Appeals thereafter denied Petitioners' timely filed Petition for Rehearing and/or Rehearing En Banc on May 26, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This Petition is filed under S. Ct. R. 12.2.

## STATEMENT OF THE CASE

### Procedural Background

On January 17, 1992, a grand jury for the Western District of Missouri, Southern Division, returned a four-count Indictment charging Petitioner Susan D. Bieri in Count I with conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846, Count II, possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), Count III, use of a firearm in violation of 18 U.S.C. § 924(c), and Count IV, criminal forfeiture, governed by 21 U.S.C. § 853. Petitioner Leonard Bieri, III was charged with Counts I, II, and IV. On February 14, 1992, a superseding Indictment was filed which charged Susan D. Bieri with all four counts as delineated in the original Indictment, and Petitioner Leonard Bieri with all counts of the original Indictment. The Petitioners entered pleas of not guilty to all counts of the Indictment.

On March 13, 1992, Petitioner Leonard Bieri filed a Motion to Suppress Warrant. Petitioner Susan D. Bieri filed a Motion to Suppress Statements and Search Warrant on April 1, 1992. On March 20, 1992, a suppression hearing was held before the Honorable Russell Clark, United States District

Judge, Western District of Missouri. Following the presentation of evidence, Judge Clark denied the Petitioners' Motions to Suppress Search Warrant and Petitioner Susan D. Bieri's Motion to Suppress Statements.[1]

Petitioners waived trial by jury and on July 8, 1992, were tried by the District Court. At the conclusion of the trial, the Court found the Petitioners guilty of Counts I and II, not guilty of Count III, and declared forfeiture as to Count IV. On April 2, 1993, the Petitioners appeared before the Honorable Russell Clark for sentencing. The District Court sentenced Petitioner Susan D. Bieri to 51 months imprisonment, $100 special assessment, no fine, and Petitioner Leonard Bieri to 57 months imprisonment, $100 special assessment, and no fine. The Court ordered forfeiture as to Tract 4 of the Bieri farm, the tract where marijuana was seized from the house and outbuildings. The Petitioners filed a timely Notice of Appeal on April 2, 1993, appealing judgments and sentences as to Counts I, II, and IV. On April 22, 1993, Judge Clark issued an Order of Forfeiture as to the Petitioners for Tract 4 of the Bieri farm. Petitioners' counsel timely filed a Notice of Appeal as to the Order of Forfeiture on May 3, 1993. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3742, and Fed. R. App. P. 4(b).

On April 13, 1994, the United States Court of Appeals for the Eighth Circuit entered its Order affirming the District Court's use of a preponderance of evidence standard to determine whether or not forfeiture was applicable under 21 U.S.C. § 853. The Court of Appeals held that the District Court erred in forfeiting only Tract 4 of the four tract farm without engaging in a proportionality analysis, and, therefore, reversed the Order of Forfeiture and remanded to the District Court

1 The District Court's Order was verbal and not memorialized in writing.

for the entry of a judgment forfeiting the entire farm unless the District Court, on remand, determined that forfeiture of the entire farm amounted to a constitutionally excessive fine under the Eighth Amendment. Thereafter, on May 20, 1994, the Court of Appeals denied Petitioners' timely filed Petition for Rehearing and/or Rehearing En Banc.

On April 3, 1994, the United States Court of Appeals for the Eighth Circuit entered its order affirming Petitioners' convictions, holding that the Judge issued the search warrant on probable cause, and that the search warrant was not overly broad. Thereafter, on May 26, 1994, the Court of Appeals denied Petitioners' timely filed Petition for Rehearing and/or Rehearing En Banc.

This appeal follows, and jurisdiction is evoked pursuant to 28 U.S.C. § 1254, and Sup. Ct. R. 13. This is a S. Ct. R. 12.2 Petition.

**Factual Background**

On the evening of January 14, 1992, George Ruiz was traveling through Oklahoma on his way from Tucson, Arizona to Springfield, Missouri. At a little after 9:30 p.m., Trooper Gary Hornbeck of the Oklahoma Highway Patrol stopped Ruiz on the Will Rogers Turnpike in Craig County, Oklahoma for a routine traffic violation. Ruiz gave the trooper consent to search his vehicle. As a result of that search, the trooper discovered approximately 45 pounds of marijuana wrapped in brown sticky paper.

The vehicle with the marijuana inside was towed to troop headquarters. At headquarters, Ruiz was interrogated by Trooper Hornbeck and agents of the Oklahoma Bureau of Narcotics. The officer and agents requested Ruiz to assist in their investigation; Ruiz agreed to cooperate and to show the law enforcement officers where he was delivering the marijuana.

The Oklahoma agents took Ruiz's vehicle and the marijuana to Missouri where they met agents of the Drug Enforcement Administration ("DEA") and Missouri State troopers. Taney County law enforcement officers were notified, and Deputy Sheriff Richard Ringler of the Taney County Sheriff's Office obtained an anticipatory search warrant for the Bieri farm.

A Complaint for search warrant was presented to Taney County Associate Circuit Court, Judge Joseph Chowning, by Deputy Ringler. The deputy, in anticipation of the delivery to the Bieri farm, presented the Complaint and accompanying documents to the Judge at approximately 3:00-4:00 p.m.; the Complaint, which was signed by an Assistant Prosecuting Attorney of Taney County, referenced only an aerial photo map. The Complaint presented to the Court did not reference or incorporate any affidavit. Evidence adduced at the hearing indicated that Deputy Ringler presented a personal affidavit to the Court, which, while written in the past tense, described events yet to occur. The Complaint for search warrant identified the property to be searched merely as the "residence and other buildings and vehicles belonging to Leonard and Susan D. Bieri located on the property known as N 1/2 of sec. 24, township 24N, range 17 West of Taney County, Missouri." This area encompassed well over 150 acres. The affidavit indicated that the delivery was going to be at the Bieri *residence.*

The Judge testified at the suppression hearing that he signed the anticipatory search warrant because it would be served late at night. Judge Chowning acknowledged during his testimony that he gave the application only cursory review. The Judge testified that he was not familiar with the Bieri farm or the specific rural area where it was located. The Judge admitted there was nothing in any of the documents to give rise to facts supporting probable cause that there would

be marijuana in the outbuildings or vehicles. The Judge indicated that his decision was based on "experience and intuition." The Judge further testified that, based on his experience, drugs and paraphernalia and apparatuses could be "anywhere out there - everywhere, possibly." Judge Chowning issued a warrant permitting a search of the residence and other buildings or vehicles on the property, as described in the Complaint, which encompassed over 150 acres. The warrant did not list any condition governing execution, and the warrant was not narrowly drawn.

Following issuance of the warrant, Deputy Ringler met other law enforcement officers, including DEA agents and other federal agents in Branson, Missouri to make the controlled delivery and execute the search warrant. Ruiz was in the lead auto driven by a DEA agent, and other officers followed in subsequent vehicles. Ruiz was given a tape recorder in order to tape the delivery and any corresponding conversation during delivery. When the agents and officers arrived at the Bieri farm, Ruiz left the DEA agent's vehicle, delivered the marijuana at the Bieri home, received $300 from Susan Bieri, and after approximately 25 minutes, returned to the law enforcement officers waiting outside. Officers then executed the search warrant.

As a result of the search of the residence, the law enforcement officers found in the residence the 45 pounds of marijuana delivered by Ruiz immediately prior to the search, some smaller amounts of marijuana, and a manilla envelope with money and notes. A scale was discovered on the kitchen counter. A search of the outbuildings revealed marijuana contained in commercial feed bags. Also found in the outbuildings was brown wrapping material of the type in which the 45 pounds delivered on the night of the search was wrapped. Additionally, officers found a Seal-A-Meal and scale. The total amount of marijuana seized on Tract 4 of the Bieri farm was approximately 141 pounds.

At trial, the Petitioners orally renewed their Motions to Suppress the Search Warrants, and any fruits of the illegal search. Their motion was overruled by the District Court. Following closing arguments, the District Court found the Petitioners guilty of Counts I and II, and found forfeiture pursuant to Count IV, in that the District Court held, by a preponderance of evidence standard, that the property was used to facilitate drug activity. The District Court specifically found that the farm was not obtained during the alleged violation, and that the property was not obtained as a result of the violation. The District Court found the Petitioners not guilty of Count III. Issues regarding proportionality were raised before the District Court, but not specifically addressed by the District Court in its finding of forfeiture. The Court thereafter issued an Order of Forfeiture as to Tract 4.

The United States Court of Appeals for the Eighth Circuit, in its Opinion, found that § 853(a) does not explicitly state what standard of proof is required for criminal forfeiture, but references to persons convicted of a drug offense and the imposition of a sentence on such a person; further, that the rebuttable presumption of § 853(d) denoted a preponderance of the evidence standard. Thus, the Court of Appeals held that criminal forfeiture is a form of punishment, akin to a sentencing enhancement, and, therefore, the proper standard of proof is the preponderance of the evidence standard. As to the appeal of Petitioners' criminal convictions, the Eighth Circuit found that the Judge had probable cause, under the totality of circumstances, to issue a search warrant for the entire Bieri farm, and that the warrant was not overly broad.

## ARGUMENT

### I. WHETHER THE CORRECT STANDARD OF PROOF IN A CRIMINAL FORFEITURE ALLEGATION, CHARGED UNDER 21 U.S.C. § 853, IS BEYOND A REASONABLE DOUBT OR PREPONDERANCE OF THE EVIDENCE.

Forfeiture is "something to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty." *Black's Law Dictionary* 545 (5th ed. 1979). The United States Government has been using forfeiture penalties since the founding of the nation to reach profits and property gained through crime. *See* Brikey, *Forfeiture of Attorney's Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 Va. L. Rev. 493, n. 1 (1986). This Court has recently held in *Austin v. United States*, _____ U.S. _____, 113 S. Ct. 2801, 2808-09, n. 9 (1993), and *Alexander v. United States*, _____ U.S. _____, 113 S. Ct. 2766, 2784 (1993), that forfeiture, whether *in rem* or *in personam*, is historically understood as imposing punishment.

Civil forfeiture proceedings exist in many areas connected with criminal activity, including gambling vessels, bribe money, and liquor. Id. The traditional difference between civil and criminal forfeiture is that civil forfeiture is an *in rem* action, while criminal forfeiture is an *in personam* action. See Note: The Criminal Forfeiture Provisions of the RICO and CCE Statutes: Their Application to Attorney's Fees, 19 J.L. Reform, 1199, 1201, n. 13 (1986), *citing Palmyra*, 25 U.S. (12 Wheat) 1 (1827). *In rem* forfeiture creates a legal fiction wherein property itself is guilty of the crime. Id. at 1203; *see also Austin v. United States*, _____ U.S. _____, 113 S. Ct. at 2808. This fiction was developed primarily to expand the reach of the courts. *Austin v. United States*, _____ U.S. _____, 113 S. Ct. at 2809, n. 9, *citing Republic Nat'l Bank of Miami v. United States*, 506 U.S. _____, 113 S. Ct. 554 (1992). Persons "innocent" of the criminal offense may still have their property forfeited.

Whereas criminal forfeiture is an *in personam* proceeding, the focus is on the person who committed the crime, not on the property. Traditionally, criminal forfeiture could not take effect until after a defendant's conviction. The prime objective is punishment of the owner, and hinges on the defendant's guilt or innocence. Therefore, the title of the forfeitable property did not vest in the Government until after conviction.

Forfeiture, as applied in United States civil and criminal proceedings, has its roots in old English law where a tenant could lose all his property to his lord due to a breech of fidelity. *Black's Law Dictionary* 585 (5th ed. 1979). The Eighteenth Century law of attainder also required that a defendant absolutely forfeit all his goods and chattels to the Crown upon conviction for a felony for treason. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). *See also United States v. Nichols*, 841 F.2d 1485, 1486 (10th Cir. 1988), *citing Blackstone's Commentaries*. Even though criminal forfeiture was a feature of the common law at the beginning of the American Republic, the founding fathers were hesitant to expand its use. See *United States v. Nichols*, 841 F.2d at 1487. *See also* U.S. Const. art. III, § 3. Concerns about how forfeiture would affect a defendant's family and heirs led the first Congress to exclude forfeiture of a citizen's estate as a form of criminal punishment. *Id.* Until RICO and CCE, the only other time Congress enacted a criminal forfeiture statute was to punish confederate soldiers after the Civil War. *Id.*

Prior to the enactment of § 853, criminal forfeiture was rare. As noted by the legislative history of § 853, criminal forfeiture is "an in personam proceeding against a defendant in a criminal case, and is imposed as a sanction against the Defendant upon his conviction." *See* S. Rep. No. 98-225, 98th Cong., 2d Session, reprinted in 1984 United States Congressional and Administrative News 3182, 3376 (forfeiture section) (hereinafter "U.S.C.C.A.N."). Congress first acted to provide

for criminal forfeiture when it passed the Racketeer Influenced and Corrupt Organizations statute ("RICO"), 18 U.S.C. § 1961, et seq., and the Continuing Crime Enterprise statute (CCE), 21 U.S.C. 848. *Id.* With respect to elicit drug activity, Congress provided in 1978 that 21 U.S.C. § 881, the civil forfeiture statute, would be applicable to proceeds of elicit drug activity. Further, assets used in drug smuggling could be civilly forfeited under the custom laws. *See* 19 U.S.C. § 1595(a).

A careful reading of the legislative history of § 853 indicates that Congress sought to create a new section of criminal forfeiture which would not be as limited as the RICO and/or CCE statutes, which would address the issue of defendants avoiding forfeiture by removing, transferring, and concealing assets prior to conviction, which would alleviate the need to pursue virtually all drug related forfeitures through civil proceedings, and which would create a more efficient method of obtaining forfeiture of assets of drug defendants. *See* U.S.C.C.A.N. at 3377-80. Thus, Congress made provisions for a new criminal forfeiture statute applicable to major drug offenses which closely parallelled those of the RICO forfeiture provisions, and included various criminal forfeiture implements approved by the committee. *Id.* at 3381.

In the general statement and summary of the forfeiture amendment, the legislative history notes that under present law (law existing in 1984), Congress recognized that under a civil forfeiture provision, the preponderance of the evidence standard applied, and, therefore, civil forfeitures had an advantage over criminal forfeitures in that the Government's burden of proof was lower in such cases. *Id.* at 3376, 3379. However, Congress continued to recognize and apply the legal concept that criminal forfeitures must be alleged in an information or indictment, and that if the defendant was found guilty of the underlying offense, then a special verdict must be returned with respect to the forfeiture

allegation and a judgment of forfeiture be entered against a defendant, referencing to Fed. R. Crim. P. 31(c) and 32(b)(2). *Id.* at 3376-77. It is interesting to note that the legislative history states that when Congress amended the RICO forfeiture statute, 18 U.S.C. § 1963, it recognized that the United States would have to prove its forfeiture allegations in the criminal case beyond a reasonable doubt. *Id.* at 3392. Similarly, in discussing the proposed new section, later denoted as 21 U.S.C. § 853, the legislative history states that the statute was, in nearly all respects, identical to the RICO criminal forfeiture statute as amended in § 302 of the bill, and that to the greatest extent possible, the provisions of Title 21 criminal forfeiture statutes set out in § 303 of the bill parallel those of the amended RICO forfeiture provisions set out in § 302. Petitioners respectfully assert that these comments included in the legislative history clearly demonstrate that Congress did not intend to reduce the burden of proof in a criminal forfeiture case, but rather recognized that the proposed new criminal forfeiture statute would, in fact, maintain the same burden of proof as those in a RICO case, beyond a reasonable doubt.

This Honorable Court has held in *In re Winship*, 397 U.S. 358 (1970), that Due Process requires that guilt in a criminal proceeding be proven beyond a reasonable doubt as to each and every element of the offense. Due Process also requires a beyond a reasonable doubt standard to apply to the elements of a criminal offense. *See Patterson v. New York*, 432 U.S. 197, 204 (1977). Petitioner maintains that this due process requirement exists under 21 U.S.C. § 853. Yet circuits have held that because § 853(d) provides that the property of persons convicted of certain felonies is subject to forfeiture if the government establishes by a preponderance of the evidence that the property was acquired during the crime for which the defendant is convicted, the beyond reasonable doubt standard does not apply. The Eleventh Circuit, in *United States*

*v. Elgersma*, 971 F.2d 690 (11th Cir. 1992), concluded that the presumption in § 853(d) would have no significance if the Government was still required to prove forfeiture beyond a reasonable doubt. *See United States v. Elgersma*, 971 F.2d at 690, 694, *citing United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir. 1989). However, it should be noted that those Circuits, which rely on this presumption, agree that the language of § 853(d) only addresses the property outlined in § 853(a)(1), property acquired by a defendant as a result of the applicable felony. Until now, courts had failed to decide whether the preponderance standard set forth in § 853(d) applies to property covered in § 853(a)(2), property used in the commission or to facilitate the commission of the felony. *See United States v. Elgersma*, 971 F.2d at 696, 697, n. 20; *Hernandez-Escarsega*, 886 F.2d at 1579, n. 9.

The Eighth Circuit recognized that Elgersma did not address the issue of § 853(a)(2), but, because it adopted *Elgersma's* reasoning as to the burden of proof with respect to § 853(a)(1) (property acquired with drug proceeds), it found it significant that § 853 gave no indication that Congress intended a different standard of proof for property used to commit or facilitate a drug crime under § 853(a)(2). Therefore, the Eighth Circuit held that there was no principle distinction between the two types of forfeitable property that would justify a higher burden of proof to forfeit property used to facilitate a drug crime rather than property that was required to be forfeited because it was acquired with drug proceeds. Petitioner asserts that the Eighth Circuit erred in following the rationale of the Third, Ninth, and Eleventh Circuits in finding that the rebuttable presumption of § 853(d) created a preponderance of evidence standard for the trier of fact in a criminal forfeiture case. Additionally, Petitioner contends that the Eighth Circuit compounded its error by attempting to bootstrap the rationale previously used by other Circuits in inter-

preting drug proceeds forfeitures under § 853(a)(1) to the application of a criminal forfeiture of property that facilitated the commission of a crime under § 853(a)(2).

The plain reading of the legislative history of § 853 indicates that Congress merely intended to create a constitutionally permissible rebuttable presumption with respect to proceeds which were obtained as a result of drug activity. The legislative history states that:

> the purpose of subsection (e) is to establish a permissible inference that property is subject to forfeiture when circumstances [drug proceeds] are established.
>
> * * *
>
> Further, that subsection (e) is framed as a permissive and rebuttable inference rather than a mandatory presumption, and therefore the presumption in subsection (e) meets constitutional requirements.

U.S.C.C.A.N. at 3182, 3395, n. 54. The legislative history footnoted to *Ulster County Court v. Allen*, 442 U.S. 140 (1979). In *Ulster County Court v. Allen*, this Court held that a rebuttable presumption is constitutionally acceptable as long as the device does not undermine the fact finder's responsibility at trial to find the ultimate facts beyond a reasonable doubt in a criminal case. *Id.* at 156.

The Eleventh Circuit held in *Elgersma* that the purpose for the citation of *Ulster County Court v. Allen* was to indicate that the rebuttable nature of the presumption leaves the trier of fact free to credit or reject the inference, and does not shift the burden of proof. The point is that a rebuttable presumption is permissible whereas a conclusive presumption would not be. *United States v. Elgersma*, 971 F.2d at 694, fn. 12, *citing*

*Hernandez-Escarsega*, 886 F.2d at 1577, n. 10. While Petitioners do not disagree that *Allen* was cited in the legislative history to indicate that the rebuttable nature of the presumption left the trier of fact free to credit or reject the inference, Petitioners assert that the notation of *Allen* in the legislative history did, in fact, indicates that the criminal forfeiture statute would retain the constitutional requirement of proof beyond a reasonable doubt while permitting the Government certain presumptions under a lower standard of proof as part of its case in forfeitures involving drug proceeds. *See United States v. Pryba*, 674 F. Supp. 1518, 1520-21 (E.D. Va. 1987), *affirmed*, 900 F.2d 748 (4th Cir.), *cert. denied*, _____ U.S. _____, 111 S. Ct. 305 (1990).

Petitioner contends that *Ulster County Court v. Allen*, as well as § 853(d)'s legislative history, would support the finding that permissible rebuttable presumptions established by a preponderance of the evidence are acceptable in the criminal context provided they do not change the ultimate reasonable doubt standard to be used by the fact finder. Petitioners contend, under § 853, the ultimate fact which must be determined by the fact finder, whether forfeiture is warranted, must be found beyond a reasonable doubt.

Petitioner submits that criminal forfeiture under § 853 requires a beyond reasonable doubt standard even with the § 853(d) rebuttable presumption, because it is founded on the premise that criminal forfeiture is a substantive criminal charge to be proved like any other. Federal Rule of Criminal Procedure 7(c)(2) and 31(e) support this proposition. Rule 7(c)(2) requires that forfeiture be specified in the indictment, and Rule 31(e) requires a special verdict for forfeiture. A note of the Advisory Committee to Rule 31(e) states:

> The assumption of the draft is that the amount of interest or property subject to criminal forfeiture is an element of the offense to be charged and proved.

*See* Advisory Committee note to Rule 7(c)(2). The advisory note to Rule 7(c)(2) states:

> The 1979 amendment:
>
> > The amendment to Rule 7(c)(2) is intended to clarify its meaning. Subdivision (c)(2) was added in 1972, and as noted in the Advisory Committee note thereto was "intended to provide procedural implementation of the recently enacted criminal forfeiture provision of the Organized Crime Control Act of 1970, Title IX, § 1963, and the comprehensive drug abuse prevention and control Act of 1970, Title II, § 408(a)(2). These provisions reestablish a limited common law criminal forfeiture, necessitating the addition of subdivision (c)(2) and corresponding changes in Rule 31 and 32, for at common law the defendant in a criminal forfeiture proceeding was entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction.

The legislative history of § 853 indicates that in discussing the federal law which existed in 1984, that Congress recognized that criminal forfeiture had to be alleged in the information or indictment; that the defendant must be found guilty by utilizing a special verdict which must be returned with respect to the forfeiture allegation, *citing* to Fed. R. Crim. P. 31(e) and 32(b)(2). See U.S.C.C.A.N. at 3376, 3377. Thus, if forfeiture is to be charged and proved as an element of the offense with accompanying trial procedures, congressional references to Rule 31(e) can be interpreted as incorporating the proof beyond a reasonable doubt standard. Petitioners note that those Circuits, including the Eighth Circuit, that have upheld the preponderance of evidence standard, claim that Rule 7 relates to notice and is unrelated to the standard of proof. Further, these Circuits claim that the advisory notes of

Rules 31(e) and 7(c) do not have the force of law, or were predated before the 1984 amendments, or are merely incorrect. *See United States v. Sandini*, 816 F.2d 869, 875 (3d Cir. 1987); *United States v. Hernandez-Escarsega*, 886 F.2d at 1578. However, the advisory note, 1979 amendment, to Rule 7(c)(2) does indicate that criminal forfeiture is a substantive offense, and suggests that at common law the defendant was entitled to notice, trial and a special jury finding; procedures inherent in any criminal case. There is no delineation or indication either in the rule or the legislative history of § 853 which would suggest that the criminal trial element of proof beyond a reasonable doubt was not to be incorporated under the new statute.

Petitioners suggest that if, in fact, the rationale of the United States Court of Appeals for the Eighth Circuit, which follows the reasoning of the Third, Ninth, and Eleventh Circuits, was upheld by this Court, interesting and difficult legal questions would occur regarding the role of the trier of fact in a criminal forfeiture case. If, in fact, as the Court of Appeals asserts, criminal forfeiture is merely an aspect of sentencing, and is neither a criminal offense nor an element of a criminal offense, then the purpose of having a special verdict would be rendered moot. It would no longer be up to the trier of fact, including a jury, to determine to what extent, if any, of the interest or property would be subject to forfeiture. *See* Fed. R. Crim. P. 31(e). If criminal forfeiture is neither an element of the criminal offense nor a criminal offense, and is merely a function of sentencing, then the trial court would be free to disregard the finding of the jury as to criminal forfeiture, either as to acquittal or to the extent of the interest or property to be forfeited. Further, if criminal forfeiture is merely a part of the sentencing or punishment rather than a substantive criminal offense or an element of the criminal offense, then the Government may be free to appeal an acquittal of a criminal forfeiture case. Clearly, the rationale utilized by the

Eighth Circuit, as well as the Third, Ninth, and Eleventh Circuits, is fraught with potential difficulties. The Federal Rules of Criminal Procedure cannot be read consistently with the legislative history of § 853 without concluding that it was Congress' intent to maintain the mandatory presumption of proof beyond a reasonable doubt while permitting constitutional and permissible rebuttable presumptions.

Petitioners would respectfully suggest that the conclusion that a beyond reasonable doubt standard applies to § 853 is supported by the fact that the United States may pursue a civil forfeiture action under 21 U.S.C. § 881, which allows proof by a preponderance of the evidence. *See* U.S.C.C.A.N. at 3379. In fact, the Government may pursue either a criminal and civil forfeiture successively or the Government may pursue a civil forfeiture involving the same property at issue in an unsuccessful criminal prosecution because of the different standards of proof. *See One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972). In *One Lot Emerald*, this Court decided that the Government could bring a civil forfeiture action regarding certain property after its owner had been acquitted on criminal smuggling charges which included a forfeiture provision. The fact that the Government had not proved its criminal case beyond a reasonable doubt did not preclude it from later proving a similar case in civil forfeiture by a preponderance of the evidence standard. *Id.* at 235. It is clear that while the new forfeiture statute under § 853 was designed to ease the use of criminal forfeiture and provide a separate statutory section, it was not Congress' intent to diminish the possibility of successive actions. *See* U.S.C.C.A.N. at 3376. If the burdens of proof were identical under both civil and criminal forfeiture, the Government would face collateral estoppel problems every time it failed to prove its criminal prosecution and attempted to bring a successive civil forfeiture proceeding. The legislative his-

tory of § 853 indicates that Congress did not anticipate such collateral estoppel problems in bolstering criminal forfeiture actions. Thus, this would clearly indicate that Congress was anticipating a beyond reasonable doubt standard in criminal forfeiture proceedings.

Petitioners respectfully submit that the purpose of § 853 was to conserve judicial law enforcement resources by allowing the Government to present evidence that could be used both to convict for substantive crimes and to prove forfeiture. See U.S.C.C.A.N. at 3380. However, there is no indication that Congress intended that the criminal forfeiture statute of § 853 have a standard of proof other than beyond a reasonable doubt. Criminal forfeiture has always been considered distinct from civil forfeiture. Common law, the Federal Rules of Criminal Procedure, and the opinions of this Court, require that a trier of fact in a criminal forfeiture case, under 21 U.S.C. § 853, consider if forfeiture should exist utilizing a beyond reasonable doubt burden of proof. A thorough reading of the legislative history of § 853 supports this position, and the Petitioners ask this Court to clarify the law as to this issue.

## II. WHETHER A SEARCH WARRANT ISSUED BY A JUDGE BASED ON HIS "INTUITION AND EXPERIENCE" MEETS FOURTH AMENDMENT REQUIREMENTS OF PROBABLE CAUSE AND PARTICULARITY.

The Fourth Amendment guarantees that no warrant shall be issued without probable cause. Justice Marshall defined "probable cause" to mean less than evidence which would justify condemnation..... [A] seizure made under circumstances which warrant suspicion. *Blocke v. United States*, 11 U.S. (7 Cranch), 339, 348 (1813). This Court, in *Illinois v. Gates*, 462 U.S. 213, 238 (1983), suggested that probable cause is a "fair probability that contraband or evidence of the crime

will be found." In *Texas v. Brown*, 460 U.S. 730, 742 (1983), the plurality of this Court said that probable cause "does not demand any showing that such belief can be correct or more likely true than false."

The Fourth Amendment categorically prohibits the "general, exploratory rummaging [of] a person's belongings" by requiring "a particular description of the thing to be seized." *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Limiting searches to the "specific areas and things for which there is probable cause to search, the requirement insures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The particularity requirement precludes broad, general searches that know no bounds or limits and which inherently smacks of unreasonableness. *See Andresen v. Maryland*, 427 U.S. 463, 489 (1976). The Fourth Amendment does not license fishing expeditions.

### A. Anticipatory Search Warrant

The Eighth Circuit has joined seven other circuits in determining that anticipatory search warrants are not categorically unconstitutional. *See United States v. Tagbering*, 985 F.2d 946, 950 (8th Cir. 1993); *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993); *United States v. Wylie*, 919 F.2d 969 (5th Cir. 1990); *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988); *United States v. Goff*, 681 F.2d 1238 (9th Cir. 1982); *United States v. Lowe*, 575 F.2d 1193 (6th Cir. 1978); *United States ex rel. Beal v. Skaff*, 418 F.2d 430 (7th Cir. 1969). While this Court has not ruled specifically on the issue of whether or not an anticipatory search warrant is per se constitutional, Petitioners recognize that this Court, in *Illinois v. Gates*, 462 U.S. 213, 238 (1983), found that the doctrine of probable cause required a fair probability that contraband will be found in a particular place.

However, even if anticipatory search warrants may be constitutional, Petitioners contend that such a warrant conditioned on a future event presents potential for abuse above and beyond that which exists in a traditional setting. Therefore, judges who issue such warrants must be particularly vigilant in insuring that the opportunities for exercising unfettered discretion are eliminated. *See United States v. Ricciardelli*, 998 F.2d at 12.

The Second Circuit, in United States v. Garcia, 882 F.2d 699, 703 (2d Cir. 1989), and the First Circuit, in *Ricciardelli*, have noted that magistrates must set conditions governing anticipatory search warrants that are explicit, clear, and narrowly drawn so as to avoid misunderstanding or manipulation by Government agents. The Eighth Circuit has recognized the reasoning of Garcia in *United States v. Tagbering*, 985 F.2d at 950. In order to limit discretion of Government agents when using an anticipatory search warrant, the First and Second Circuits have suggested that a magistrate must insure that the triggering event is both ascertainable and preordained; the warrant should restrict the officer's discretion in detecting the occurrence of the event to almost ministerial proportions. Additionally, the contraband must be on a sure and irreversible course to its destination, and a future search of the destination must be made expressly contingent upon the contraband's arrival there. There must be a nexus between the criminal act, the evidence to be seized, and the place to be searched. Thus, the event that triggers the search must be the delivery of the contraband to the premises to be searched.

The Eighth Circuit, in its Opinion, held that "[t]he record shows that the issuing Judge found probable cause based on the officer's affidavit stating that Ruiz was planning to deliver marijuana to the Bieris' *farm*." Deputy Ringler's affidavit, however, indicated that the delivery was to occur at

the Bieri *residence*, thus there was not a nexus between the triggering event, the delivery of marijuana to the Bieri residence, and a search warrant of the Bieris' *farm* in its entirety, including outbuildings or vehicles. The Petitioners' position is bolstered by the Judge's testimony at the suppression hearing wherein he stated that he had no probable cause based upon the affidavit or Complaint to issue a search warrant for the outbuildings or vehicles; the Judge stated further that his decision was based on reason and intuition. Therefore, Petitioners respectfully suggest that the anticipatory search warrant in this case cannot withstand constitutional scrutiny. *See United States v. Ricciardelli*, 998 F.2d at 13; *see also United States v. Garcia*, 882 F.2d at 704 (probable cause requires a belief that the contraband will be located on the premises where the search takes place).

**B. Probable Cause**

Petitioners contended before the Eighth Circuit that the search warrant was invalid because insufficient probable cause existed for the issuance of the search warrant. The Eighth Circuit, in its Opinion, stated that the Judge's testimony at the suppression hearing showed that "he considered the application, affidavit, and area photos when determining if probable cause existed." However, the transcript at the suppression hearing clearly indicates that Judge Chowning did not carefully review the affidavit, complaint for search warrant, or area photos, and that, in fact, Judge Chowning indicated that his determination that the search warrant should be issued for any area other than the residence was based on experience and intuition; that, based on his experience, drugs and paraphernalia and apparatus "could be anywhere out there - everywhere possibly." The deputy whose affidavit was submitted with the complaint for search warrant testified at the suppression hearing that there was no other evidence of

marijuana at any other location than at the residence. Furthermore, Judge Chowning indicated at the suppression hearing that his issuance of a broad search warrant was based on his feelings from past experiences as a judge in Taney County, Missouri that the Bieris may be growing marijuana on their farm. Evidence adduced at the suppression hearing indicated, however, that there was nothing in the affidavit or complaint for search warrant that supported such a belief by Judge Chowning, and, in fact, the deputy testified that he provided no information relative to that issue. Therefore, Petitioners respectfully suggest that the Eighth Circuit erred in finding that sufficient probable cause existed for the Court to issue a search warrant for the entire Bieri farm, encompassing outbuildings and vehicles. Further, that the Eighth Circuit erred in holding that a totality of circumstances approach, *citing Illinois v. Gates*, 462 U.S. 213 (1983), supported a finding that the affidavit regarding Ruiz' delivery to the Bieri residence established that contraband would probably be found on the farm.

**C. The Warrant Lacked Particularity and was Overly Broad**

Petitioners contend that the search warrant was invalid because it was overly broad as to the areas to be searched and the location of the premises. The Fourth Amendment prohibits general searches and requires that a search described with particularity to items to be seized. *See Andresen v. Maryland*, 427 U.S. 463, 480 (1976). The language in the search warrant is constitutionally acceptable if it is sufficiently definite to enable the searcher to reasonably ascertain and identify the things authorized to be seized. *See Coolidge v. New Hampshire*, 403 U.S. at 467.

The Eighth Circuit found that the search warrant was sufficient in its description which listed the place to be searched as the residence and other buildings and vehicles belonging

to Leonard and Susan Bieri located on the property known as North 1/2 of section 24, Township 24N, Range 17W of Taney County, Missouri. Petitioners respectfully submit that the description was without sufficient particularity. Recognizing that the requisite specificity of the description differs from rural and urban areas and depends heavily on the facts of each case, there was no evidence in this case of sufficient probable cause that any narcotics would be found in any outbuildings or vehicles. The Deputy testified he could not have looked at his affidavit and been able to find the Bieri farm based on the instructions within the affidavit. The deputy had to follow the informant Ruiz in order to find the farm. The Eighth Circuit's Opinion is contrary to that of the Tenth Circuit in *United States v. Durrough*, 927 F.2d 498, 500 (10th Cir. 1991), wherein the Court held that the warrant provided sufficient unique landmarks which would enable officers to locate the residence with reasonable effort. Likewise, the Eighth Circuit's opinion is contrary to *United States v. Ellison*, 793 F.2d 942, 947 (8th Cir. 1987), wherein instructions within the warrant provided both road and mileage. Therefore, Petitioners respectfully suggest the warrant was, in fact, overly broad.

The Eighth Circuit held that the Judge did not know which building contained the contraband, and, therefore, made a reasonable decision to allow the officers to search the home and outbuildings. Petitioners respectfully suggest that such a factual finding was clearly erroneous. The evidence adduced at the suppression hearing through the testimony of both the Judge and the Deputy indicated that the affidavit provided to the Associate Circuit Court clearly stated that the delivery was going to be at the residence. No information was provided to the Judge issuing the warrant that any other marijuana could or would be located on the farm, including outbuildings, vehicles, or fields. Therefore, a finding by the Eighth Circuit that the Judge's decision was reasonable was contrary to both

the case law of this Court, as well as other circuits, and is factually incorrect.

The Eighth Circuit further found that the Judge allowed the warrant for the outbuildings and vehicles on the farm because he reasonably expected the officers would find drugs and paraphernalia in both the house and outbuildings. Petitioners respectfully suggest that this is contrary to the requirement that probable cause be determined in order to support an issuance of a search warrant; that such probable cause exists where there are sufficient facts to justify the belief by a reasonable person that contraband or evidence of the crime will be found in the place to be searched. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983). The Eighth Circuit found probable cause existed because the officers had apprehended Ruiz with approximately 45 pounds of marijuana and told them he was delivering it to the Bieri farm. This factual finding is incorrect because both the affidavit and the testimony of the Judge and Deputy indicated the only evidence presented to the Judge issuing the warrant was with respect to the delivery of marijuana to the *residence* of the Bieris'. Therefore, based upon the law and the facts in this case, this Court should find that insufficient probable cause existed to issue the search warrant for the Bieri *farm*, and that the warrant was overly broad and lacked particularity.

It should be noted that the Eighth Circuit did not reach the issue of good faith finding that the warrant was lawful. The Court stated *in dicta* that the Deputy could easily have assumed the warrant issued by the Judge with many years of experience was lawful. Petitioners respectfully suggest that the good faith exception, as delineated in *United States v. Leon*, 468 U.S. 897 (1984), did not apply in this case. In *Leon*, this Court held that suppression would continue to be appropriate in situations where, notwithstanding the issuance of the

warrant, the law enforcement officer had knowledge or may properly be charged with knowledge that the search was unconstitutional under the Fourth Amendment. Id. at 919. Instances where a suppression would be appropriate include when a warrant is so facially deficient, i.e., failing to particularize the place to be searched or the things to be seized, that the executing officer cannot reasonably presume it to be valid, or the warrant is so lacking indicia of probable cause as to render official belief in its existence entirely unreasonable. Id. at 923. If, however, the warrant's defectiveness results from mere technical errors, not readily apparent to a competent officer, suppression may not be warranted under a good faith exception. *Id.* at 926, see also *Massachusetts v. Sheppard*, 468 U.S. 981, 984 (1984).

In the present case, Petitioners respectfully assert that the defect on the warrant's face was apparent to the officers executing the search warrant; the warrant did not satisfy the criteria for particularity and was overly broad. The officers were aware that no evidence existed or was presented to the Judge issuing the warrant that marijuana would be found anyplace else but the Bieri residence. Therefore, the good faith exception should not and does not apply.

Additionally, Petitioners contend that the Judge abandoned his neutral and detached role in issuing the warrant, and, therefore, the Deputy could not objectively and reasonably rely on the warrant. See *United States v. Leon*, 468 U.S. at 921. The Court of Appeals did not reach this issue in its Opinion, finding that the argument was not properly raised before the District Court, and citing to *United States v. Olano*, _____ U.S. _____, 113 S. Ct. 1770, 1777 (1993), found that plain error did not apply.

Petitioners respectfully ask this Court to consider whether the search warrant in this case was invalid, and that, therefore, all marijuana seized, or, alternatively, the marijuana seized in the outbuildings and any other locations other than the residence, should be suppressed. Further, that whereas the Fourth Amendment protections against unreasonable searches and seizures apply in forfeiture proceedings, whether such evidence, derived from the unlawful search, in violation of the Fourth Amendment, is inadmissible for purposes of forfeiture. *See One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965).

## CONCLUSION

Petitioners respectfully request this Court to find that 21 U.S.C. § 853, criminal forfeiture, requires the trier of fact to make a finding on the ultimate issue of forfeiture utilizing a beyond reasonable doubt standard. Petitioners contend that the United States Court of Appeals for the Eighth Circuit has rendered its decision in conflict with the prior decisions of this Court, or, alternatively, has decided an important question of federal law which has not been but should be settled by this Court; whether or not criminal forfeiture under 21 U.S.C. § 853 requires a finding by the *ultimate* trier of fact utilizing a beyond reasonable doubt standard or the preponderance of evidence standard. Petitioners further contend that the search warrant issued in this case failed to meet Fourth Amendment constitutional requirements. Petitioners assert that the decision of the Eighth Circuit deprived them of due process and fair trial as required in the Fifth and Sixth Amendments to the United States Constitution and violated their Fourth Amendment rights. Therefore Petitioners respectfully pray this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

WYRSCH ATWELL MIRAKIAN
LEE & HOBBS, P.C.
JAMES R. WYRSCH (MO #20730)
(Counsel of Record)
JACQUELINE A. COOK (MO #36389)
1101 Walnut Street, 13th Fl.
Kansas City, MO 64106-2122
Tel: (816) 221-0080
Fax: (816) 221-3280
ATTORNEYS FOR PETITIONERS

I.

The Bieris first argue that the district court erred in denying their motions to suppress evidence seized from their farm. They contend the anticipatory search warrant was invalid for several reasons: (1) no exigent circumstances or probable cause existed; (2) the warrant did not comply with state law; (3) the search warrant was overbroad in the description of the place to be searched; (4) it did not comply with Federal Rule of Criminal Procedure 41; and (5) it was not executed in good faith. After a suppression hearing, the district court denied their motions.

We review the district court's denial of a motion to suppress evidence under a clearly erroneous standard. *United States v. Hyten*, 5 F.3d 1154, 1156 (8th Cir. 1993). We affirm the district court's decision unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake was made. *Id.*

The Bieris first argue the anticipatory search warrant was invalid because no exigent circumstances existed and the warrant did not sufficiently limit the officer's discretion if the events did not develop as anticipated. Anticipatory search warrants may be issued even absent exigent circumstances. *United States v. Taqerbing*, 985 F.2d 946, 950 n.6 (8th Cir. 1993). An anticipatory search warrant should be upheld if independent evidence shows the delivery of contraband will or is likely to occur and the warrant is conditioned on that delivery. *See id.* at 949 (*citing United States v. Garcia*, 882 F.2d 699, 702 (2d Cir.), *cert. denied*, 493 U.S. 943 (1989)). Statements of a reliable informant can provide sufficient basis for issuing a warrant. *United States v. Pressley*, 978 F.2d 1026, 1027 (8th Cir. 1992). The record shows that the issuing judge found probable cause based on the officer's affidavit stating that Ruiz was planning

to deliver marijuana to the Bieris' farm. The judge studied the affidavit and the aerial photograph before issuing the warrant. Thus, the district court did not err in denying the motions to suppress evidence. *See United States v. Koelling*, 992 F.2d 817, 823 (8th Cir. 1993).

The Bieris also argue the anticipatory search warrant was invalid because the officers did not show probable cause to the issuing judge. We review the district court's determination of probable cause under a clearly erroneous standard, and give considerable deference to the issuing judge's determination of probable cause. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). Probable cause exists when there are sufficient facts to justify the belief by a prudent person that contraband or evidence of a crime will be found in the place to be searched. *United States v. Reivich*, 793 F.2d 957, 959 (8th Cir. 1986). The district court found probable cause existed because the officers had apprehended Ruiz with approximately forty-five pounds of marijuana, and he told them he was delivering it to the Bieris' farm. We take a "totality of circumstances" approach in determining whether probable cause existed, *see Gates*, 462 U.S. at 230, and conclude that the facts set forth in the affidavit regarding Ruiz's delivery were sufficient to establish that contraband would probably be found on the farm.[3]

[3] We reject the Bieris' contention that we should find the warrant invalid because Deputy Ringler's affidavit was not incorporated by reference into the search warrant and therefore the warrant was vague. *See United States v. Williams*, 10 F.3d 590, 593, (8th Cir. 1993). We find it immaterial whether the application for the warrant contained specific words of incorporation, because the application itself contains an adequate legal description describing the farm and a reference to an accompanying aerial photograph. *See Tagerbing*, 985 F.2d at 950; *cf. United States v. Curry*, 911 F.2d 72, 77 (8th Cir. 1990) (finding insufficient particularity where no words of reference incorporating the affidavit were listed and the space for a description of the premises was left blank, *cert. denied*, 498 U.S. 1094 (1991). Furthermore, Judge Chowning's testimony at the suppression hearing shows he considered the application, the affidavits and the photo when determing if probable cause existed.

The Bieris next argue that the search warrant was invalid because it was overbroad as to the areas to be searched and the location of the premises. The Fourth Amendment requires that a search warrant describe with particularity the items to be seized. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976); *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987). The warrant must also enable the searcher to locate and identify the premises with reasonable effort. *United States v. Ellison*, 793 F.2d 942, 947 (8th Cir.), *cert. denied*, 479 U.S. 987 (1986). "The requisite specificity of a description differs for rural and urban areas and depends heavily on the facts of each case." *United States v. Dorrough*, 927 F.2d 498, 500 (10th Cir. 1991). We examine applications and affidavits for issuing a search warrant using a "common sense approach and not in a hypertechnical fashion." *Williams*, 10 F.3d at 593.

The search warrant listed the items to be seized as "MARIHUANA (sic) to include those items used for weighing, packageing (sic) and distribution thereof." It described the place to be searched as the "Residence and other buildings and vehicles belonging to Leonard & Susan BIERI, located on the property known as N 1/2 of Sec. 24, township 24N, range 17 West of Taney County Missouri." At the suppression hearing, Leonard Bieri testified that his farm buildings are the only structures on the described tract of property, and that the only road through the property ends at their farm buildings. An aerial photo map accompanied the search warrant, showing that the Bieri property is in an extremely remote area. The district court concluded the warrant described the location with sufficient clarity to allow the officers to locate the premises. We believe the district court did not err in that conclusion.

The Bieris' argument that the warrant was overbroad because it failed to describe which buildings the officers could search is without merit. Because the judge did not know which

building contained the contraband, he made a reasonable decision to allow the officers to search the home and outbuildings. *See Gates*, 462 U.S. at 236 (substantial deference owed to issuing judge's decision). The judge allowed the warrant for the buildings and vehicles on the farm because he reasonably expected the officers would find drugs and paraphernalia in both the house and farm buildings. There is "no reason why a search warrant based upon a controlled delivery must be more limited than other warrants." *Tagerbing*, 985 F.2d at 951 n.8 (observing that warrants to search for drug paraphernalia and records based upon controlled deliveries have been upheld in many cases). We believe the district court did not err in concluding the search warrant was not overbroad.

Next, the Bieris contend the court should have suppressed the evidence because the search warrant violated state law. In a federal prosecution, we evaluate a challenge to a search conducted by state authorities under federal Fourth Amendment standards. *United States v. Johnson*, No. 93-1532, slip op. at 12 (8th Cir. Jan. 3, 1994). We uphold a district court's ruling regarding the validity of a search by state officers unless it is clearly erroneous. *United States v. Eng*, 753 F.2d 683, 686 (8th Cir. 1985). A court must examine the legality of a search by state officers as if made by federal officers. *Id.* We recently concluded in *United States v. Moore*, 956 F.2d 843, 847 (8th Cir. 1992), that "evidence seized by state officers in conformity with the Fourth Amendment will not be suppressed in a federal prosecution because *state* law was violated." *Id.* (emphasis in original). Here, the district court did not decide whether the search warrant violated state law, but the court concluded the warrant was constitutionally valid. Thus, we need not decide whether the warrant violated Missouri law since we conclude the district court did not err in finding the search warrant was constitutionally valid.

The Bieris' assertion that the search warrant was invalid because it did not comply with Federal Rule of Criminal Procedure 41 is also unavailing. Rule 41, which requires specific authorization from a court for nighttime service of warrants, does not apply in this case. Yet, even if Rule 41 was relevant in determining the admissibility of evidence seized pursuant to a warrant issued under state law, *see United States v. Freeman*, 897 F.2d 346, 348-49 (8th Cir. 1990), it provides the Bieris no relief. We apply the exclusionary rule to violations of Rule 41 only if a defendant is prejudiced or reckless disregard of proper procedure is evident. *Id.* at 349. Here, the warrant was not unconstitutional and the Bieris suffered no prejudice because authorization for a night search does not need to be listed on the warrant. *See United States v. Thomas*, 489 F.2d 664 (5th Cir. 1973), *cert. denied*, 423 U.S. 884 (1975). In addition, because no evidence exists that the officers acted in bad faith, it follows that there was no reckless disregard of proper procedure by the state officers. *See Hyten*, 5 F.3d at 1157.

Finally, the Bieris argue the district court erred in relying on the good-faith exception of United States v. Leon, 468 U.S. 897, 921 (1984). *Leon* instructs that even if a warrant is invalid when an officer relies in good faith on it, the district court should not suppress the evidence. *Id.* at 921. The Bieris contend that Judge Chowning abandoned his neutral and detached role when issuing the warrant and therefore Deputy Ringler could not objectively and reasonably rely on the warrant. The Bieris did not present the issue of Judge Chowning's neutrality to the district court and, therefore, we conclude their argument is not properly before this court absent plain error. *United States v. Olano*, 113 S. Ct. 1770, 1777 (1993); *United States v. Montanye*, 996 F.2d 190, 192 (8th Cir. 1993). Since we conclude the warrant is lawful, we need not consider the *Leon* exception. Were we to consider the issue, our examination of

the record would reveal no bad faith or impartiality by Judge Chowning. We believe Deputy Ringler could easily have assumed the warrant, issued by a judge with many years of experience, was lawful.

For these reasons we find no error in the district court's denial of the Bieris' motions to suppress.

II.

The Bieris' next argument involves the district court's calculation of the weight of marijuana for the purpose of determining the base offense level. They contend the district court erred in calculating the weight and, therefore, misapplied the sentencing guidelines in violation of their constitutional rights to due process. The district court calculated the base offense level by adding the quantity of all Ruiz's prior deliveries to the Bieris (approximately forty-six pounds) and the marijuana seized from their premises on January 15, 1992, pursuant to the search warrant. The Bieris argue the base offense level should have been based solely on the amount seized on January 15, 1992. We affirm the district court's calculation.

We subject a district court's determination of drug quantity to the clearly erroneous standard. *United States v. Ruvalcaba*, 9 F.3d 41, 42 (8th Cir. 1993). In considering the base offense level, the district court must consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." United States Sentencing Commission, *Guidelines Manual*, § 1B1.3(a)(2) (Nov. 1993). In drug conspiracies, the district court may consider amounts from other drug transactions, provided the other dealings are part of the same course of conduct or scheme. *United States v. Abanatha*, 999 F.2d 1246, 1251 (8th Cir. 1993).

The district court heard testimony from Ruiz regard-

ing the quantities of marijuana he delivered to the Bieris from 1990 to January 1992. His story was corroborated by his tape-recorded conversation with Susan Bieri, who paid him $300 for the January 1992 delivery, as she had on prior deliveries. We cannot conclude the court clearly erred in believing Ruiz's testimony regarding deliveries of specific quantities of marijuana on prior occasions. *See United States v. Adipietro*, 983 F.2d 1468, 1472 (8th Cir. 1993) (findings regarding credibility of witnesses are "virtually unreviewable on appeal"). The evidence of the paraphernalia such as scales and wrapping materials and the quantities recovered at their farm support a conclusion that the Bieris distributed the marijuana delivered by Ruiz in 1990, and that it was no longer part of the quantity found on the farm in 1992. Accordingly, upon review of the record, we conclude there was no error in the district court's calculation of the quantity of marijuana to determine the base offense level.

III.

The Bieris next argue the district court erred in denying their motions for downward departures from the sentencing guidelines. They specifically contend the district court erroneously believed it had no authority to depart downward despite the existence of a rational basis for downward departure under the facts of this case. They ask us to remand to allow the district court to consider mitigating circumstances, most notably their family circumstances.

If we conclude that the district court's refusal to depart was an exercise of its discretion we cannot review the court's ruling. *See United States v. Evidente*, 894 F.2d 1000, 1004-05 (8th Cir.), *cert. denied*, 495 U.S. 922 (1990); *United States v. Trupiano*, No. 93-1264, slip op. at 13 (8th Cir. Dec. 8, 1993). However, if the district court concluded it had no authority to depart we may review the decision. *Evidente*, 894 F.2d at 1005. A district

court must impose a sentence within the applicable guidelines unless mitigating circumstances exist that were not adequately taken into account when the Sentencing Commission drafted the sentencing guidelines. *See* 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.O. For the following reasons, we conclude the district court did not err in refusing to depart downward.

The Bieris contend Judge Clark's statements from the bench during sentencing show he did not consider the facts that may have warranted departure. They specifically point us to Judge Clark's statements:

> If the sentence were left completely to my discretion in this case, in all probability I would put the defendant on probation. But I don't think under the guidelines that I have any authority. And I'm going to say, under the facts of this case that I don't have any authority to depart downward from the guidelines. Now if the Eighth Circuit feels otherwise, they can advise me.

In this case, we believe these statements do not demonstrate a belief on Judge Clark's part that he was barred as a matter of law from departing from the sentencing guidelines. Rather, we interpret his statements, specifically the words "under the facts of this case," as an acknowledgment that a downward departure was not justified. *See United States v. Vidrickson*, 998 F.2d 601, 603 (8th Cir. 1993) (per curiam). Indeed, in *United States v. Dutcher*, 8 F.3d 11, 12 (8th Cir. 1993), a panel of this court held that the district court's decision to grant a downward departure based on the defendant's role in the offense was unreviewable because it was an exercise of the court's discretion. In sentencing the defendant, the district court stated: "I do not believe that *under the circumstances* that I should sentence below fifty percent of that called for under the guidelines." *Id.* at 12 (emphasis added). This statement is sufficiently similar to Judge Clark's statements when

he sentenced the Bieris and supports our conclusion that we should not review Judge Clark's exercise of his discretion.

Even accepting the Bieris' argument that the district court believed it had no authority to depart, the conclusion that the district court erred does not follow. Certainly, the situation where both parents are sentenced to prison presents a troublesome sentencing issue. The Bieris argue the needs of their two small children warrant a downward departure, contending their children will suffer while both parents are in prison. Extraordinary family circumstances outside the "heartland" of cases the guidelines were intended to cover may be the basis of a downward departure. *United States v. Harrison*, 970 F.2d 444, 447 (8th Cir. 1992). Policy Statement 5H1.6 makes clear that family ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. This policy statement is specifically authorized by 28 U.S.C. § 994(d), which required the commission to consider whether family ties and responsibilities have any relevance to the nature, extent, place of service or other incidence of an appropriate sentence, and to take them into account only to the extent that they are relevant. Here, the district court commented that many parents are sentenced to terms of imprisonment. *See United States v. Garlich*, 951 F.2d 161, 163 (8th Cir. 199l) (family responsibilities are not generally relevant when a court is deciding whether to depart); *United States v. Tucker*, 986 F.2d 278, 280 (8th Cir. 1993) (departures are "intended to be quite rare"), *cert. denied*, 114 S. Ct. 76 (1993).

That both parents of two small children should be incarcerated presents a wrenching decision for a district court. Nevertheless, the guidelines do limit consideration of this factor. In *Harrison*, we concluded that incarceration of a single parent did not present extraordinary circumstances, and that the district court lacked authority to depart from the guide-

line range. 970 F.2d at 447. Many circuits have so held. *See United States v. Chestna*, 962 F.2d 103, 106-07 (1st Cir.) (per curiam), *cert. denied*, 113 S. Ct. 334 (1992); *United States v. Mogel*, 956 F.2d 1555, 1565 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 167 (1992); *United States v. Headley*, 923 F.2d 1079, 1082 (3d Cir. 1991); *United States v. Johnson*, 908 F.2d 396, 399 (8th Cir. 1990); *United States v. Brand*, 907 F.2d 31, 33 (4th Cir.), *cert. denied*, 498 U.S. 1014 (1990). Sentencing both parents is no different than sentencing a single parent, which many courts have held not to be extraordinary circumstances outside the "heartland" of cases covered by the guidelines. Whether both parents are incarcerated, or a single parent is imprisoned, the impact on the children, namely that they are deprived of their parent, is the same.

We conclude Judge Clark's decision not to depart from the guidelines was a determination based on the facts of this case and thus an exercise of discretion which we cannot review. However, we reach the same result from our independent examination of the record that the district court did not err as a matter of law in refusing to depart downward from the guidelines.

Susan Bieri also argues she is entitled to a downward departure based on "aberrant behavior" because she has no prior convictions relating to a controlled substance.[4] Her first-time offender status does not justify a downward departure. Although her lack of criminal record may be relevant in sentencing, *see* U.S.S.G. § 5H1.8, the guidelines have adequately accounted for the absence of a prior criminal record in the structure of the sentencing table. *See United States v. Neil*, 903 F.2d 564, 566 (8th Cir. 1990); *United States v. Simpson*, 7 F.3d 813, 819 (8th Cir. 1993) (departure from the guideline range or

[4]Leonard Bieri does not argue for a downward departure based on aberrant behavior because he has a prior conviction relating to a controlled substance.

based solely on first-time offender status is improper). As the district court lacked authority to depart downward, we affirm the Bieris' sentences.

For the foregoing reasons, we affirm the Bieris' convictions.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 93-2157

United States of America,

Plaintiff - Appellee,

v.

Susan D. Bieri and Leonard Bieri, III,

Defendants - Appellants.

Appeal from the United Sateates District Court for the Western District of Missouri

No. 93-2372

United States of America,

Plaintiff - Appellant,

v.

Leonard Bieri, III,

Defendant - Appellee,

No. 93-2373

United States of America,

Plaintiff - Appellant,

v.

Susan D. Bieri,

Defendant-Appellee.

Submitted: November 8, 1993

Filed: April 13, 1994

Before HANSEN, Circuit Judge, JOHN R. GIBSON,* Senior Circuit Judge, and JACKSON,** District Judge.

HANSEN, Circuit Judge.

*The HONORABLE JOHN R. GIBSON was an active judge of this circuit at the time this case was submitted and took senior status on January 1, 1994, before the opinion was filed.

**The HONORABLE CAROL E. JACKSON, United States District Judge for the Eastern District of Missouri, sitting by designation.

Susan and Leonard Bieri appeal the district court's order of criminal forfeiture pursuant to 21 U.S.C. § 853(a)(2) of what we shall refer to as "tract four" of the Bieris' four-tract dairy farm, and the government cross-appeals. The Bieris contend that the district court erred by (1) applying the wrong standard of proof to determine forfeitability, (2) using improperly obtained evidence to support the order of forfeiture, and (3) failing to consider proportionality under the Eighth Amendment. On cross- appeal, the government contends that the district court erred in ordering forfeiture of only one tract of the farm. We affirm in part and reverse in part.

## I. BACKGROUND

In this case, we address the Bieris' appeal of the district court's order of criminal forfeiture. In a separate opinion which we also file today, we affirm the Bieris' criminal convictions and set forth in detail the facts upon which the district court convicted the Bieris of criminal drug charges. *See United States v. Bieri*, Nos. 93-1870 & 93-1872, slip op. at 2-3 (8th Cir. Mar. , 1994). We will repeat here only those facts necessary for resolution of the forfeiture issues.

Susan and Leonard Bieri acquired a dairy farm by warranty deed in January of 1984. The single deed describes four tracts of real property; three of the tracts are located in Taney County, Missouri, and one in Ozark County, Missouri. (Appellants' App. at 66.) The four tracts are contiguous. The farm's house and outbuildings are located on tract four.

In January of 1992, law enforcement officers obtained and executed a search warrant for the Bieris' farm. Pursuant to the warrant, the officers seized approximately 141 pounds of marijuana, cash, a loaded gun, brown wrapping material, and other drug paraphernalia, all found in the house and outbuildings on tract four. Subsequently, a grand jury indicted Susan and Leonard by a superseding indictment on charges of con-

spiracy to possess with intent to distribute marijuana, possession with intent to distribute marijuana, use of a firearm in relation to a drug trafficking offense, and forfeiture of their farm which was alleged to have been used to commit or to facilitate drug trafficking. The Bieris moved to suppress the evidence obtained as a result of the search, but the district court overruled the motions. Following a bench trial, the district court acquitted the Bieris of the firearm charges and convicted them of conspiracy to possess with intent to distribute and possession with intent to distribute marijuana. The district court found by a preponderance of the evidence that the Bieris had used their property to facilitate drug trafficking. At the sentencing hearing, the district court ordered forfeiture only of tract four of the farm containing the house and outbuildings. The Bieris appeal, and the government cross-appeals, the order of forfeiture.

## II. DISCUSSION

The Bieris first argue that the district court erred in applying a preponderance of the evidence standard to determine that the Bieris used their property for drug trafficking, rather than requiring the government to prove that fact beyond a reasonable doubt.

We begin our analysis with the language of the statute because the applicability of the reasonable doubt standard depends upon how the Congress has defined the offense. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). It is a fundamental principle that due process requires the government to prove guilt in a criminal proceeding beyond a reasonable doubt as to each element of an offense. *See In re Winship*, 397 U.S. 358, 361-64 (1970). A sentencing sanction, however, comes into play only after the defendant has been found guilty of an offense beyond a reasonable doubt, and a factor used to determine the sentence does not itself invoke the right to proof

beyond a reasonable doubt. *See McMillan*, 477 U.S. at 86; *United States v. Galloway*, 976 F.2d 414, 425 (8th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1420 (1993). *See also United States v. Coleman*, 990 F.2d 419, 421 (8th Cir. 1993) (prove factual prerequisites to sentence enhancement by a preponderance of the evidence). The language of section 853(a) indicates that Congress intended criminal forfeiture of property to be a punishment and the use of the property to commit or to facilitate a drug trafficking offense to be its factual underpinning, and not a separate offense. Section 853(a) states in part as follows:

> Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law
>
> - -
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violations; . . .
>
> . . . .
>
> The court, in imposing sentences on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. . . .

21 U.S.C. § 853(a).

Section 853(a) does not explicitly state what standard of proof is required for criminal forfeiture. Section 853(a) ex-

pressly states, however, that it shall apply to persons convicted of a drug offense and that in imposing sentence on such a person, the court must, "in addition to any other sentence imposed," order forfeiture of all property described in section 853(a). 21 U.S.C. § 853(a); *see also United States v. Elgersma*, 971 F.2d 690, 692-93 (11th Cir. 1992) (en banc). Congress has clearly designated criminal forfeiture as part of the sentencing or punishment phase of a criminal proceeding and has given no indication that a higher standard of proof applies than normally applies at sentencing. Thus, although charged as a count in the indictment, criminal forfeiture is neither an element of a criminal offense nor a criminal offense itself. Therefore, proof beyond a reasonable doubt is neither constitutionally nor statutorily mandated. *See Elgersma*, 971 F.2d at 693-94.

Furthermore, section 853(d) creates a rebuttable presumption that property is subject to criminal forfeiture "if the United States establishes by a preponderance of the evidence that" the defendant acquired the property during the period of the drug violation or within a reasonable time thereafter and that there was no likely source for the property other than drug proceeds. "This presumption would have no significance if the government was still required to prove forfeiture beyond a reasonable doubt" of property acquired by drug proceeds under section 853(a)(l). *Elgersma*, 971 F.2d at 694. The presumption of section 853(d) is a clear indication that Congress intended criminal forfeiture under section 853(a)(1) (property acquired with drug proceeds) to be proven by a preponderance of the evidence. There is no similar presumption or statement of the burden of proof relating to section 853(a)(2) (property used to facilitate a drug crime) which applies to the Bieris' case. Nevertheless, it is significant that section 853 gives no indication that Congress intended a higher standard of proof for property used to commit or to facilitate

a drug crime under section 853(a)(2) than is required for property acquired with the proceeds of a drug violation under section 853(a)(1). Absent either a constitutional requirement or statutory language indicating a higher burden of proof, there is simply no principled distinction between the two types of forfeitable property that would justify a higher burden of proof to forfeit property used to facilitate a drug crime than is required to forfeit property acquired with drug proceeds. The defendant's putative property rights in both kinds of property are identical. "No federal court of appeals . . . has construed section 853 to differentiate between proceeds of the offense and other property on the burden of proof necessary for forfeiture." *United States v. Smith*, 966 F.2d 1045, 1051 (6th Cir. 1992) (a § 853(a)(2) case) .

Other circuits that have considered the issue have held that the preponderance of the evidence standard is the proper standard in criminal forfeiture cases. *See Elgersma*, 971 F.2d at 694-97; *Smith*, 966 F.2d at 1052; *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *United States v. Sandini*, 816 F.2d 869, 875-76 (3d Cir. 1987). We agree. Accordingly, we conclude that the district court did not err in determining the forfeitability of the Bieris' property by using a preponderance of the evidence standard.

The Bieris contend that this court's statement in *United States v. Wiley*, 997 F.2d 378, 384 (8th Cir.), *cert. denied*, 114 S. Ct. 600 (1993), that "[o]ur standard for reviewing the jury's finding of forfeiture is whether, in the light most favorable to the prosecution, any reasonable jury could have found the property forfeitable beyond a reasonable doubt," is controlling. We disagree. We find that this statement has been severely undercut by two United States Supreme Court cases

filed the same day that we filed *Wiley*.[1] *See Alexander v. United States*, 113 S. Ct. 2766 (1993); *Austin v. United States*, 113 S. Ct. 2801 (1993). In *Alexander*, the Supreme Court stated that criminal forfeiture "is clearly a form of monetary punishment" and should be analyzed under the Excessive Fines Clause of the Eighth Amendment.[2] 113 S. Ct. at 2775-76. In *Austin*, the Court held that civil forfeiture also is a form of punishment subject to Eighth Amendment limitations of the Excessive Fines Clause. 113 S. Ct. at 2812. These cases clearly indicate that forfeiture, either criminal or civil, is intended to be a form of punishment akin to a sentencing enhancement, and not a separate offense. Thus, our statement in *Wiley* can no longer be binding authority on the correct burden of proof in forfeiture cases, if it ever was.

The Bieris next argue that the forfeiture is improper because the district court erroneously relied on evidence ob-

[1]We also note that the *Wiley* court offered no analysis to justify the standard articulated, and more importantly, the standard of proof was not at issue in *Wiley*. The *Wiley* court merely applied the standard of proof that the district court had applied, and that standard was not questioned on appeal.

[2]Alexander involved forfeiture under the Racketeer Influenced and Corrupt Organizations Act (RICO), pursuant to 18 U.S.C. § 1963(a). This statute requires in part that "[t]he court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection." 18 U.S.C. § 1963(a). This language is identical to that found in 21 U.S.C. § 853(a). Thus, we conclude that the same Eighth Amendment Excessive Fines analysis applies for criminal forfeiture under 21 U.S.C. § 853(a). We note, however, that while a portion of the forfeiture language is the same, RICO does not contain any provision like § 853(d), and the statutory analogy cannot be completely carried over to the burden of proof. *See United States v. Pelullo*, 14 F.3d 881, 902-03 (3d Cir. 1994). We also note a different legislative history for the drug forfeiture statute. *See id.* at 903.

tained pursuant to an invalid search warrant to support the order of forfeiture. Because we conclude today in the Bieris' criminal appeals that the anticipatory search warrant was valid, this argument fails. *See Bieri*, Nos. 93-1870 & 93-1872, slip op. at 3-8.

The Bieris' final argument, concerning the proportionality of the forfeiture, is intertwined with the government's contention on cross-appeal that the district court erred in forfeiting only one tract of the farm. Before addressing the proportionality of the forfeiture, we must define what portion of the Bieris' farm is "property" subject to forfeiture under section 853. The government contends that the district court should have forfeited the entire farm, and the Bieris contend that the district court correctly considered the farm as four separate tracts and only forfeited one of them.

Section 853(a) states in relevant part that a person convicted of a drug offense "shall forfeit to the United States . . . any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" a drug offense. 21 U.S.C. § 853(a)(2). "By specifying that property is subject to forfeiture if it was used 'in any manner or part' to commit or facilitate a drug offense, Congress plainly provided for forfeiture of property even where only a portion of it was used for the prohibited purposes." *United States v. Littlefield*, 821 F.2d 1365, 1367 (9th Cir. 1987). Thus, if a defendant uses any part of a piece of property to commit or to facilitate a drug offense, the district court is required to forfeit the whole property. *See Smith*, 966 F.2d at 1053.

There remains some uncertainty in spite of the clear language of the statute because the statute does not clearly define what constitutes one piece of "property." Congress provided only minimal guidance, stating that a liberal con-

struction of section 853 is necessary "to effectuate its remedial purposes." 21 U.S.C. § 853(o). The Sixth Circuit in *Smith* held that a four-tract farm should be treated as four separate properties because the property consisted of four separate tracts purchased in four separate instruments of transfer executed on four separate dates. 966 F.2d at 1054. The *Smith* court found that the natural source for defining "property" subject to forfeiture is the instrument creating the defendant's interest in the property. *See id.* at 1053; *see also United States v. Reynolds*, 856 F.2d 675, 676-77 (4th Cir. 1988) (same analysis under civil forfeiture statute). We agree. Although the owner may view a single piece of property as separable tracts, the owner's subjective characterization of the property cannot serve as the basis for determining what constitutes "property" under section 853. *See Smith*, 966 F.2d at 1053. We adopt the Sixth Circuit's rule that "tracts of real property subject to forfeiture under section 853 are defined by the instruments and documents that created the defendant's interest in the property." *Id.* at 1054.

Unlike Smith, who acquired his four-tract farm in four separate instruments, the Bieris acquired all four tracts comprising their farm as a single unit in a single deed. The deed describes four individual but contiguous tracts of real property, historically described as separate tracts but owned and conveyed as a single unit even before the Bieris' purchase of the property. The historical description of the property, like the owner's subjective characterization of the property, is inapposite. The critical facts are that the Bieris purchased the property as a whole, at a single time, that it was conveyed to them in one instrument, and that the property is contiguous. These facts indicate that the property is in fact a single unit for purposes of section 853(a), and this interpretation is consistent with the congressionally mandated liberal construction and remedial purpose of section 853(a). *See* 21 U.S.C. §

853(o). We conclude that section 853(a) required the district court to forfeit the whole farm, and therefore, the district court erred in forfeiting only tract four.[3]

Finally, we address the Bieris' constitutional claim that the forfeiture of their property amounts to an excessive fine and cruel and unusual punishment in violation of the Eighth Amendment. The Eighth Amendment's prohibition against cruel and unusual punishment does not apply in the context of criminal forfeiture. *See Alexander,* 113 S. Ct. at 2775 (Cruel and Unusual Punishment Clause is concerned with the durations and conditions of confinement). However, the Eighth Amendment's prohibition against excessive fines applies because a criminal forfeiture is a "fine" for purposes of the Excessive Fines Clause. *Id.* at 2775-76. Accordingly, courts must consider the proportionality of the forfeiture, which requires a fact-specific evaluation of all the circumstances of the illegal activity including the extent of the defendants' criminal drug activities and the amount of time that they conducted those activities in order to determine whether the forfeiture was unconstitutionally "excessive." *See id.* at 2776. If the district court determines that the forfeiture constitutes an unconstitutionally excessive fine given the specific facts of a particular case, the district court may then order forfeiture of less than the whole in an effort to preserve the forfeiture by tailoring it to fit within the broad boundaries of constitutional proportionality.

[3]The dissent's call to have a particularized finding of fact as to what "portion" of the entire farm was used to facilitate the drug dealing in order to define what property is forfeitable would render meaningless the Congress's mandate that the whole of the property should be forfeited if used "in any manner or part" for illegal purposes. 21 U.S.C. § 853(a)(2). As the dissent points out, the record already contains the trial court's findings that "I don't think there's any question whatsoever but what this farm was being used to facilitate drug trafficking." (Trial Tr. at 139.) In our view, the dissent fails to distinguish between what property Congress has declared to be forfeitable by statute and what property the Constitution will allow to be forfeited in any particular case.

The Bieris argue that their criminal activity was not extensive, that it did not encompass a substantial period of time, and that only a minimal relationship existed between the property and their criminal offenses. The district court's order of forfeiture does not contain any findings of fact on the proportionality issue. Although the district court ordered forfeiture of only one tract of the forfeitable property, the court did not indicate that it engaged in a proportionality analysis that required this result. In order for this court to provide a meaningful review, the district court must make express findings of fact to support its proportionality analysis. The district court may order forfeiture of less than the whole farm only upon express factual findings supporting a determination that, based upon all of the circumstances of the case including the extent and length of the defendant's drug activity, forfeiture of the whole would be an excessive fine. We remand with instructions for the district court to expressly consider and determine the excessive fine issue.

## III. CONCLUSION

The district court did not err in applying a preponderance of the evidence standard to determine that the Bieris' farm was forfeitable. The district court erred, however, by ordering forfeiture of only tract four of the four-tract farm, which was purchased in a single instrument as a single contiguous unit of property, without engaging in a proportionality analysis. Accordingly, we reverse the order of forfeiture and remand to the district court for the entry of a judgment forfeiting the entire farm, unless the district court on remand determines that the forfeiture of the entire farm amounts to a constitutionally excessive fine under the Eighth Amendment, in which case the district court should enter such judgment of forfeiture as it deems in accord with the Constitution.

JOHN R. GIBSON, Senior Circuit Judge, concurring in part and dissenting in part.

I agree with the court that the preponderance of evidence standard is proper in criminal forfeiture cases and that a proportionality analysis must be made. The district court understandably did not make such an analysis, as *Alexander v. United States*, 113 S. Ct. 2766 (1993), and *Austin v. United States*, 113 S. Ct. 2801 (1993), were not decided at the time of the district court's forfeiture decision. I respectfully dissent, however, on what constitutes "property" and the extent of forfeiture appropriate in this case. The court errs in looking only to the document conveying title to determine "property" for the purpose of forfeiture.

The court adopts the Sixth Circuit's rule in *Smith* that a court should look at the instrument or documents creating the property interest to determine whether the property is a single unit or divisible. *See* 966 F.2d 1045, 1053 (6th Cir. 1992). *Smith* is much different than the case before us today. The Smiths initially acquired the land through four separate conveyances. *Id.* at 1054. Upon the Smith's divorce, the wife conveyed her interest in the four tracts to her husband by a single quit claim deed. *Id.* The court found that the transfer by quit claim deed did not create Mr. Smith's interest, but rather that he obtained the property through four separate deeds. *Id.* The district court then ordered only one tract forfeited. *Id.* at 1055-56.

Although the Bieris acquired all four tracts to their farm through a single general warranty deed, the deed described the four tracts separately, as tract one, tract two, tract three and tract four. Tracts two, three and four are located and taxed in Taney County, Missouri, and tract one is located and taxed in Ozark County, Missouri. In Missouri, land must be recorded in the real estate records of the county where it is lo-

cated. *See* Mo. Rev. Stat. § 59.400 (1986 & Supp. 1993). Further, real property is taxed by the county of its situs. *See* Mo. Rev. Stat. § 137.010- 137.960 (1986 & Supp. 1993) (Assessment and Levy of Property Taxes). In this case we should not look only to the deed or conveyance to determine whether the Bieris' farm, consisting of four tracts, is a single piece of property for forfeiture purposes. The question of whether the tracts are divisible for purposes of forfeiture is a factual issue, and indeed is intertwined with the proportionality issue.

I believe we should remand to the district court to consider several factual issues before ordering forfeiture. First, the district court should determine whether the entire farm, certain tracts or only portions of certain tracts were "used, or intended to be used, in any manner or part, to commit, or facilitate the commission of" the drug trafficking. *See* 21 U.S.C. § 853. Although the record contains findings of fact by the district court that the farm was used to facilitate the drug trafficking, the court at sentencing ruled only that tract four be forfeited. I believe specific facts must be developed to demonstrate the extent of use of each of the tracts in the drug operation. The record is lacking in factual findings regarding which tract or tracts facilitated the drug trafficking.

For example, the record shows that Ruiz delivered marijuana to the house and that drugs were stored in the barn. Both the house and barn are located on tract four. The government introduced evidence that it was necessary to drive over other tracts to reach the house. In *Smith*, the court held that real property used to conceal the commission of an offense created a sufficient nexus to find that it facilitated the drug trafficking. 966 F.2d at 1055- 56. Here, the district court should consider whether the other tracts concealed or in any other way facilitated the Bieris' drug trafficking operation, and make detailed findings of fact in determining which tracts should be forfeited.

I would reverse the order of forfeiture and remand to the district court with instructions to make additional findings of fact and to enter an order of forfeiture for the tract or tracts of the Bieris' farm that facilitated their drug trafficking.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 93-2157/2372/2373WMS

United States of America,

Appellee/Cross-Appellant,

vs.

Susan Bieri and Leonard Bieri,

Appellants/Cross-Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 20, 1994

Order Entered at the Direction of the Court:

(/S/ Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 93-1870WMS, 93-1872WMS

| | | |
|---|---|---|
| United States of America, | * | |
| | * | |
| Appellee, | * | Order Denying Petition |
| | * | for Rehearing and Sug- |
| vs. | * | gestion for Rehearing |
| | * | En Banc |
| Susan D. Bieri, et al. | * | |
| | * | |
| Appellant. | * | |

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 26, 1994

Order Entered at the Direction of the Court:

/S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | No. 92-03044-01/02-CR-S-4 |
| | ) | |
| SUSAN D. BIERI, | ) | |
| and | ) | |
| LEONARD BIERI, III, | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER OF FORFEITURE**

Based upon the evidence adduced and the declaration of Forfeiture entered previously in the above-styled case, and for the reasons stated at bar, it is hereby

ORDERED, ADJUDGED and DECREED that pursuant to 21 U.S.C. §§ 846, 841(a)(1), and 853(a), the following property is hereby condemned and forfeited to the United States of America:

All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, described as:

TRACT NO. 4 (TANEY COUNTY, MISSOURI) The Northeast quarter of Section 24 and nine acres off of the Southwest Quarter of the Southeast Quarter of Section 13 beginning at the Southwest corner thereof thence North 145 yards, thence due East 165 yards, thence diagonally to the Southeast corner of said Southwest Quarter Southeast Quarter thence West 1/4 mile to place of beginning, all in Township 24, Range 17 and aggregating 169 acres more or less.

The Court finds that the above-listed forfeited asset constitutes property that was used or intended to be used, in some manner or part, to commit or facilitate the commission of the aforementioned violation.

It is further ORDERED that the above-listed property shall be seized forthwith by the United States Marshal for the Western District of Missouri or his duly authorized representative and disposed of in accordance with the law.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

1. That the United States Marshal is hereby ORDERED to record forthwith a copy of this Order in each county where the above-described real property is located, and which Order, when recorded, shall be notice to any transferee or potential transferees, of the interest of the United States of America therein.

2. That all of the aforementioned forfeited property is to be held by the United States Marshal's Service in their secure custody and control.

3. That pursuant to 21 U.S.C. § 853(n)(1), the United States Marshal forthwith shall publish at least once for three successive weeks in a newspaper of general circulation, notice of this Order, notice of the Marshal's intent to dispose of the property in such manner as the Attorney General may direct and notice that any person, other than the defendant, having or claiming a legal interest in the above-listed forfeited property must file a petition with the Court within thirty (30) days of final publication of notice or of receipt of actual notice, whichever is earlier.

This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner un-

der penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in the forfeited property and any additional facts supporting the petitioner's claim and the relief sought.

The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the Order of Forfeiture, as a substitute for published notice as to those persons so notified.

5. That upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture pursuant to 21 U.S.C. § 853(n), in which all interests will be addressed.

ORDERED this 22nd day of April, 1993.

RUSSELL G. CLARK
Senior United States
District Judge

## CONSTITUTIONAL, STATUTORY, AND REGULATORY AUTHORITIES

The Fourth Amendment of the United States Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service and time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 853, criminal forfeiture.

(a) Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Meaning of term "property"

(b) Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

* * *

Rebuttable presumption

(d)
There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

> (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

Federal Rule of Criminal Procedure 7 provides in relevant part:

> (a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.
>
> * * *
>
> (1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state

> for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.
>
> (2) Criminal Forfeiture. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the interest or property subject to forfeiture.

Federal Rules of Criminal Procedure 31 provides in relevant part:

> (a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.
>
> * * *
>
> (e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.